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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. _____

IN THE MATTER OF THE ESTATE OF EDWARD GORDON STERN, DECEASED, H. T. MULLEN, JR., ADMINISTRATOR OF THE ESTATE OF EDWARD GORDON STERN,

V

CEILA STERN, ROBERT WEISS, MELVENA W. TRAVALIA, AUGUST WEISS, EMMA W. JOHNSON, AGNES WEISS TEULON, WILLIAM WEISS, ADELE S. STEIN, A. EDWIN STERN, JR., JENNIE W. MILLSTEIN, HARRY S. WENDER, FLORENCE MARGARET W. LEHN, SHIRLEY JOAN W. UKRAINETZ, GEORGINA L. GEPPERT, EVELYN L. BAERWALDT, HELEN L. McGOVERN, GORDON LISSEL, JEAN L. GESCHWANDTNER, THERESA L. SEIDENS, JAMES LISSEL and ALL UNKNOWN HEIRS OF EDWARD GORDON STERN.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

JENNETTE, MORRISON, AUSTIN & HALSTEAD
By: C. Glenn Austin and
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33 pp

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Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, Appellants Ceila Stern, Adele S. Stein A. Edwin Stern, Jr., Jennie W. Millstein and Harry S. Wender, appellant paternal heirs, file this statement upon which is is contended that the Supreme Court of the United States has jurisdiction to review the judgement of the Supreme Court of North Carolina entered in this case and should exercise such jurisdiction herein.

QUESTION PRESENTED

Have the Courts of North Carolina applied the North Carolina Intestate Succession Act, North Carolina General Statute 29-19, to Appellants herein so as to result in unjust and illegal discrimination between persons similarly situated in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

TABLE OF CONTENTS

Page

Opinion Below 1
Grounds of Jurisdiction of Supreme Court 1
Statutes Involved 1
Statement of the Case 2
Substantiality of Federal Questions 4
Conclusion 6
Appendices:
A. Opinion of the Supreme Court of North Carolina 8
B. Opinion of the North Carolina Court of Appeals 10
C. Notice of appeal to Supreme Court of the United States .27

TABLE OF AUTHORITIES

Cases:

Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297, (1979).

Lali v. Lali, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 503, (1978).

St. Louis I. M. & S. R. Co. v. Taylor, 210 U.S. 281, 28 S. Ct. 616, 52 L. Ed. 2d 1061, (1908).

Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1457, 52 L. Ed. 2d 31, (1977).

Statutes:

North Carolina General Statue 29-19, Succession by, through and from illegitimate children.

28 U.S.C. §2403(b).

OPINION BELOW

The opinion of the Supreme Court of North Carolina is a per curiam opinion, 322 S.E.2d 771 (NC 1984), affirming the decision of the North Carolina Court of Appeals. The decision of the Supreme Court of North Carolina is included as Appendix A (pp 8). The decision of the North Carolina Court of Appeals is included as Appendix B (pp. 10), 64 NC app 507, 311 S.E.2d 909, (1984).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action to determine the intestate heirs of an illegitimate. The judgement of the Court was entered on December 4, 1984. A timely Notice of Appeal was filed with the Supreme Court of North Carolina on February 26, 1985. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257(2).

Cases that sustain the jurisdiction of this Court include: Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760, (1979); Lali v. Lali, 439 U.S. 259, 58 L.Ed. 2d 503, (1978); Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1457, (1977); St. Louis I. M. & S. R. Co. v. Taylor, 210 U.S. 281, 28 S. Ct. 616, 52 L. Ed. 1061, (1908).

STATUTES INVOLVED

North Carolina Intestate Succession Act, North Carolina General Statute, Chapter 29; the pertinent portions thereof being the following:

ARTICLE 6.
Illegitimate Children.

§ 29-19. Succession by, through and from illegitimate children.

(a) For purposes of intestate succession, an illegitimate child shall be treated as if he were the legitimate child of his mother, so that he and his lineal descendants are entitled to take by, through and

from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him.

(b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:

(1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;

(2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 51-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

Notwithstanding the above provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.

(c) Any person described under subdivision (b)(1) or (2) above and his lineal and collateral kin shall be entitled to inherit by, through and from the illegitimate child.

(d) Any person who acknowledges himself to be the father of an illegitimate child in his duly probated last will shall be deemed to have intended that such child be treated as expressly provided for in said will or, in the absence of any express provision, the same as a legitimate child.

Also, inasmuch as the constitutionality of N.C.G.S 29-19 is questioned 28 U.S.C. §2403(b) may be applicable.

STATEMENT OF THE CASE

The case at bar involves an appeal by the paternal aunts and uncles of Edward Gordon Stern, deceased, an illegitimate who died intestate, from the order of the Pasquotank County Superior Court directing that the decedent's entire estate be distributed to his maternal heirs.

The statement of the case by the North Carolina Court of Appeals is hereby adopted as a fair presenttion of the facts for consideration of this honorable Court.

> "The decedent, Edward Gordon Stern, was born in 1927 in the Providence of Saskatchewan, Canada, and named Edward Gordon Weiss. His birth certificate does not list the name of either parent but the evidence overwhelmingly indicates that he was the son of Hilda Weiss and Edward D. Stern, who were living together at the time of his birth. (emphasis added). Apparently, Edward D. Stern and Hilda Weiss (hereinafter referred to as decedent's father and mother) never married because of religious prohibitions in Canada at the time.
>
> "The decedent lived with his parents until his mother's death in 1933. Thereafter he remained with his father until he entered the Army many years later. Decedent's name is shown on his medical records as baby and his school records as Edward Gordon Stern. These school records list Edward D. Stern as decedent's father. The evidence clearly shows Edward D. Stern considered the decedent to be his son and referred to him as such. Later in life, the decedent has his name officially changed to Edward Gordon Stern, both in the United States and in Canada. The name change in Canada was done at the request of Edward D. Stern so as to facilitate the identification of Edward Gordon Stern as his son in his will. In his last will, Edward D. Stern bequeathed "residue of my estate to my son, Edward Gordon Stern, for his own use absolutely." In 1979 Edward D. Stern leaving a residuary estate worth over $500,000.
>
> "In August of 1980, Edward Gordon Stern died intestate survived only by his aunts and uncles. At the time of his death the decedent was a citizen and resident of Pasquotank County, North Carolina."

In the Trial Court, the Superior Court of Pasquotank County, by oral argument, it was argued to the trial judge on behalf of the appellants herein, that an interpretation of the North Carolina General Statutes in such a manner as to deprive the appellants of one-half of the estate of Edward Gordon Stern would violate the Equal Protection Clause of the fourteenth Amendment of the Constitution of the United States. Thereafter in appellants' briefs in both the North Carolina Court of Appeals and the Supreme Court of North Carolina, the argument was restated and was also pursued in oral argument before both of the aforementioned Courts. The Trial Court rejected the Constitutional arguments without written comment. The opinion of the majority in the decision rendered by the North Carolina Court of Appeals held in part "nor do we agree that G.S. 29-19 as applied to this case runs afoul of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." However, in the same opinion, Judge Johnson, dissenting, stated in part "to completely exclude this category of natural heirs of the illegitimate child from intestate distribution on the basis of an ideal of administrative efficiency, without any consideration of the possibility of accurate and reliable proof of paternity produced in any manner other than those listed in G.S. 29-19(b)(1) or (2) is unnecessary, is not structured to further any permissable state objective and results in an unconstitutional denial of the paternal heirs' rights to equal protection under the law." The North Carolina Supreme Court issued a per curiam judgment affirming the judgment of the North Carolina Court of Appeals without a written opinion.

SUBSTANTIALITY OF FEDERAL QUESTION

This case presents the substantial federal question of gender discrimination which completely excludes the category of natural heirs of the illegitimate child from intestate distribution on the basis of an idea of administrative efficiency, without any consideration of the possiblity of accurate and reliable proof of paternity produced in any manner other than those listed in North Carolina General Statute 29-19(b)(1) or (2) which is unnecessary, is not structured to further any permissable state objective and results in an unconstitutional

denial of the paternal heirs' rights to equal protection under the law. (Judge Johnson's dissent in the North Carolina Court of Appeals decision, p. 16, Appendix B)

It has never been contended in any Court below that Edward Gordon Stern was not the natural son of Edward D. Stern. In fact, the North Carolina Court of Appeals majority opinion stated the evidence "overwhelmingly indicates" (emphasis added) he was such. This underlines the broad implications of the question presented.

The highest Courts in North Carolina have refused to look at the most reliable evidentary presentation available for no legitimate, much less compelling, reason. Consider the following acts taken by both, or either, the deceased father and son publicly and solemnly establishing the relationship of father and son.

1. Edward Gordon Stern was born to Hilda Weiss and Edward D. Stern during cohabitation which continued until the death of the mother.

2. Edward Gordon Stern continued to reside with and was raised by Edward Stern following the death of the mother.

3. School and medical records, produced on information obviously provided by the parents or child, showed the father and son relationship.

4. Two name changes were effected by Edward Gordon Stern to accommodate his name to that of his father, both in the United States and Canada. Significantly, the Canadian name change under oath, listed Edward D. Stern as the father of Edward Gordon Stern.

5. The name change in Canada was done at the insistence of the father to document Edward Gordon Stern as his son in his will.

6. Edward D. Stern executed the most solemn of all legal documents, a will, naming Edward Gordon Stern as his son.

In view of the above, it is difficult to imagine more clear, cogent and convincing evidence for scrutiny by the State that the Sterns were father and son; and following that, that the Appellants herein are paternal heirs, entitled under North Carolina law to one-half of the estate. It has been well established by this Court that a State Court when passing on issues of paternity and intestate succession must "consider the possibility of a middle ground between the extremes of complete exclusion and case by case determination of paternity." Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31, (1977). This North Carolina has not done. Admittedly, the State has an interest in the orderly administration of estates. However, it has also been established by this Court that the judicial history of a statute under Constitutional attack is a necessary source of inquiry. Lali v. Lali, 439 U.S. 259, 99 S. Ct. 518, 58 L. Ed. 2d 503, (1978). This case is the judicial history of statutory interpretation in North Carolina. It clearly demonstrates that without the intervention of this Court, North Carolina will chain itself to the blind administration of the illegitimate estates without regard to justice, no matter how compelling, accessible or reliable the facts establishing paternity.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated February 27, 1985.

Respectfully submitted,

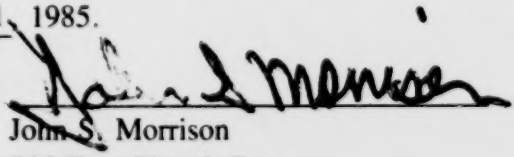
C. Glenn Austin and
John S. Morrison
Attorneys for Appellants

CERTIFICATE OF SERVICE BY MAIL

I, John S. Morrison, a member of the bar of the Supreme Court of the United States and counsel of record for Ceila Stern, Adele S. Stein, A. Edwin Stern, Jr., Jennie W. Millstein and Harry S. Wender, appellants, hereby certify that on March 1, 1985 pursuant to the Rules of the Supreme Court, I served three copies of the foregoing jurisdictional statement on Robert Weiss, Melvena W. Travalia, August Weiss, Emma W. Johnson, Agnes Weiss Teulon, William Weiss, Florence Margaret W. Lehn, Shirley Joan W. Ukrainetz, Georgina L. Geppert, Evelyn L. Baerwaldt, Helen L. McGovern, Gordon Lissel, Jean L. Geschwandtner, Theresa L. Seidens, James Lissel and alll unknown heirs of Edward Gordon Stern, appellees, by depositing such copies in the United States Post Office, Elizabeth City, North Carolina, with first class postage prepaid, properly addressed to the post office address of Joseph M. Griffin, Suite 907, Cameron Brown Building, 301 South McDowell Street, Charlotte, North Carolina 28204, and likewise o the Honorable Lacy Thornburg, Attorney General of the State of North Carolina at the Department of Justice, Raleigh, North Carolina and likewise on Herbert T. Mullen, Jr., executor of the Estate of Edward Gordon Stern at 501 East Main Street, Elizabeth City, North Carolina 27909.

All parties required to be served have been served.

Dated March 1, 1985.



John S. Morrison
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Elizabeth City, North Carolina 27909
(919) 335-5413

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

IN THE MATTER OF THE ESTATE OF EDWARD GORDON STERN, Deceased, H. T. Mullen, Jr., Administrator of the Estate of Edward Gordon Stern

V

No. 156A84 - Pasquotank

CEILA STERN, ROBERT WEISS, MELVENA W. TRAVALIA, AUGUST WEISS, EMMA W. JOHNSON, AGNES WEISS TEULON, WILLIAM WEISS, ADELE S. STEIN, A. EDWIN STERN, JR., JENNIE W. MILLSTEIN, HARRY S. WENDER, FLORENCE MARGARET W. LEHN, SHIRLEY JOAN W. UKRAINETZ, GEORGINA L. GEPPERT, EVELYN L. BAERWALDT, HELEN L. McGOVERN, GORDON LISSEL, JEAN L. GESCHWANDTNER, THERESA L. SEIDENS, JAMES LISSEL and ALL UNKNOWN HEIRS OF EDWARD GORDON STERN

Appeal by respondent-paternal heirs from a decision of the Court of Appeals, 66 N.C. App. 507, 311 S.E.2d 909 (1984), one judge dissenting, which affirmed the order entered in favor of respondent-maternal heirs by Allsbrook, J., at the 23 August 1982 Session of Superior Court, Pasquotank County.

JENNETTE, MORRISON, AUSTIN & HALSTEAD, by C. Glenn Austin and John S. Morrison, for respondent paternal heirs.

GRIFFIN & RUFF, by Joseph M. Griffin for respondent maternal heirs.

Per Curiam.

AFFIRMED.

APPENDIX B

NO. 831SC152
NORTH CAROLINA COURT OF APPEALS
Filed: 21 February 1984

IN THE MATTER OF THE ESTATE OF EDWARD GORDON STERN, DECEASED, H. T. MULLEN, JR., ADMINISTRATOR OF THE ESTATE OF EDWARD GORDON STERN

V.

Pasquotank County
No. 81SP32

CELIA STERN, ROBERT WEISS, MELVENA W. TRAVALIA, AUGUST WEISS, EMMA W. JOHNSTON, AGNES W. TEULON, WILLIAM WEISS, ADELE S. STEIN, A. EDWIN STERN, JR., JENNIE W. MILLSTEIN, HARRY S. WENDER, FLORENCE MARGARET W. LEHN, SHIRLEY JOAN W. UKRAINETZ, GEORGINA L. GEPPERT, EVELYN L. BAETWALDT, HELEN L. McGOVERN, GORDON LISSEL, JEAN L. GESCHWANDTNER, THERESA L. SEIDENS, JAMES LISSELL AND ALL UNKNOWN HEIRS OF EDWARD GORDON STERN

Appeal by respondent paternal heirs of Edward Gordon Stern from Allsbrook, Judge. Order entered 16 September 1982 in Superior Court, Pasquotank County. Heard in the Court of Appeals 16 January 1984.

This is an appeal by the paternal heirs of Edward Gordon Stern, an illegitimate who died intestate, from the order of the Pasquotank County Superior Court directing that the decedent's entire estate be distributed to his maternal heirs. The decedent, Edward Gordon Stern, was born in 1927 in the province of Saskatchewan, Canada and named Edward Gordon Weiss. His birth certificate does not list the name of either parent, but the evidence overwhelmingly indicates that he was the son of Hilda Weiss and Edward D. Stern who were living together at the time of his birth. Apparently, Edward D. Stern and Hilda Weiss (hereinafter referred to as decedent's father and mother) never married because of religious prohibitions in Canada at the time.

The decedent lived with his parents until his mother's death in 1933. Thereafter he remained with his father until he entered the Army many years later. Decedent's name is shown on his medical records as a baby and his school records as Edward Gordon Stern. These school records list Edward D. Stern as decedent's father. The evidence clearly shows Edward D. Stern considered the decedent to be his son and referred to him as such. Later in life, the decedent had his name officially changed to Edward Gordon Stern, both in the United States and in Canada. The name change in Canada was done at the request of Edward D. Stern so as to facilitate the identification of Edward Gordon Stern as his son in his will. In his last will, Edward D. Stern bequeathed "the residue of my estate to my son, Edward Gordon Stern, for his own use absolutely." In 1979 Edward D. Stern died leaving a residuary estate worth over $500.000.

In August of 1980, Edward Gordon Stern died intestate survived only by his aunts and uncles. At the time of his death, the decedent was a citizen and resident of Pasquotank County, North Carolina. The present proceeding was brought to determine the distributees of the decedent's estate. After hearing the evidence, the trial judge concluded tha the decedent was survived by only the collateral kindred of his late mother and that the collateral kindred of the late Edward D. Stern were not entitled to share in the estate. From the order entered 16 September 1982, the respondent paternal heirs appealed.

Jennette, Morrison, Austin and Halstead, by John S. Morrison and C. Glenn Austin, for respondent appellants.

Griffin, Gerdes, Mason, Brunson, Wilson and Jeffries, by Joseph M. Griffin and J. David Tolbert, for respondent appellees.

WEBB, Judge.

The question presented on this appeal is whether the heirs of the alleged natural father of Edward Gordon Stern have any rights to the decedent's estate. We believe they do not and affirm the order directing that the decedent's estate be distributed only to his maternal heirs.

G.S. 29-19(a) provides that for purposes of intestate succession, an illegitimate shall be treated as if he were the legitimate child of his mother so that he is entitled to inherit by, through and from his mother and his other maternal kindred, and they are entitled to take from him. There is no dispute that the decedent was illegitimate and that the respondent maternal heirs are entitled to some share of the decedent's estate.

The right of a putative father and the paternal heirs to inherit by, through and from an intestate illegitimate is governed by G.S. 29-19(b) and (c) which state as follows, in pertinent part:

> (b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:
>
> (1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;
>
> (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer name in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

> (c) Any person described under subdivision (b) (1) or (2) above and his lineal and collateral kin shall be entitled to inherit by, through and from the illegitimate child.

The record is devoid of any evidence indicating that Edward D. Stern was ever judicially adjudged to be the decedent's father as provided in G.S. 29-19(b)(1) or that he ever acknowledged his paternity as provided in G.S. 29-19(b)(2).

G.S. 29-19(d) provides a further basis through which an illegitimate may inherit from his putative father. That section provides that:

> (d) Any person who acknowledges himself to be the father of an illegitimate child in his duly probated last will shall be deemed to have intended that such child be treated as expressly provided for in said will or, in the absence of any express provision, the same as a legitimate child.

Edward D. Stern so acknowledged himself as the father of the decedent when he stated in his last will that he bequeathed his residuary estate to "my son, Edward Gordon Stern."

The appellant paternal heirs argue that since this acknowledgement of paternity by Edward D. Stern in his will is sufficient to permit the decedent to inherit from his putative father, it should also be sufficient to permit the putative father or his heirs to inherit from the decedent. They maintain that unless G.S. 29-19 is interpreted so as to permit the paternal heirs to share in the decedent's estate, the resulting distribution will be in violation of the Equal Protection Clause of the Fourteenth Amendment.

In essence, the appellants contend that G.S. 29-19(c) must be judicially amended to include subsection (d) of that statute in order for the statute to pass constitutional muster. We do not agree. G.S. 29-19(c) clearly and unambiguously provides that a putative father and his kindred are only entitled to inherit from an illegitimate child if paternity has been established by one of the methods prescribed in G.S. 29-19(b). Edward D. Stern's paternity was not established by either method; therefore, his heirs are not entitled to inherit from

the decedent. it is well settled that "[w] here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." See 12 Strong's N.C. Index 3d, Statutes § 5.5 (1978). G.S. 29-19(d) is equally clear in its meaning and applies only when the child is taking under a will from the putative father and not when the putative father or his heirs are attempting to inherit from the child under the intestacy statutes.

Nor do we agree that G.S. 29-19 as applied to this case runs afoul of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. While the statute does classify the illegitimate's mother (and her heirs) and the putative father (and his heirs) differently by placing the additional requirement on the father to establish his paternity by one of the statutorily prescribed methods before he is permitted to inherit, this classification is substantially related to permissible state interests.

The United States Supreme Court has made it clear that when considering statutes based on illegitimacy, courts are to apply an intermediate level of review which requires that the statute be substantially related to permissible state interests. See Trimble v. Gordon, 430 U.S. 762, 97, S. Ct. 1459, 52 L.Ed. 2d 31 (1977); Lalli v. Lalli, 439 U.S. 259, 99 S. Ct. 518, 58 L.Ed. 2d 503 (1978). Though the classification in the present case differs from those in Trimble, supra, and Lalli, supra, in that it is not a classfication of an individual on the basis of his or her legitimacy, but is a classification of the parents of an illegitimate; nevertheless, we shall apply the intermediate standard of review rather than the lower standard of review because it is at least arguable that the classification here is one "based on illegitimacy." Even applying this more stringent standard, we find that G.S. 29-19 meets the requirements of the Equal Protection Clause.

The North Carolina Supreme Court has previously considered the constitutionality of G.S. 29-19 in the case of Mitchell v. Freuler, 297 N.C. 206, 254 S.E. 2d 762 (1979). In Mitchell, supra, the Court held that G.S. 29-19 and the statutes in pari materia do not violate the Equal Protection and Due Process Clauses of the United States

Constitutions, since those statutes are substantially related to the permissible state interests they are intended to promote. The Court identified the state's interest as being the following: (1) to mitigate the hardships created by our former law which permitted illegitimates to inherit only from the mother and from each other; (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and (3) at the same time, to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Id. at 216.

Although Mitchell, supra, is distinguishable from the present case in that it concerns the inheritance rights of an illegitimate rather than the inheritance rights of the parents of an illegitimate, the statute and the state interests involved are the same. Not only does the classification here foster the same state interests recognized in Mitchell, supra, it imposes a much lighter burden on the one allegedly discriminated against. Unlike the illegitimate who can do nothing to establish his right to inherit from his father, the father of an illegitimate has the ability to insure that he will be an intestate taker -- he simply has to acknowledge his child in the prescribed manner. Unlike the illegitimate, the father can preserve his rights and he should not be rewarded for his failure to do so.

We conclude that the requirement imposed on the father of an illegitimate who would inherit from his illegitimate child is substantially related to the important state interests G.S. 29-19 is intended to promote. For this reason, we find no violation of the Equal Protection Clause.

Affirmed.

Chief Judge VAUGHN concurs.

Judge JOHNSON dissents.

No. 831SC152
NORTH CAROLINA COURT OF APPEALS
Filed: 21 February 1984

IN THE MATTER OF THE ESTATE OF EDWARD GORDON STERN, DECEASED, H.T. MULLEN, JR., ADMINISTRATOR OF THE ESTATE OF EDWARD GORDON STERN

V.

Pasquotank County
No. 81SP32

CELIA STERN, ROBERT WEISS, MELVENA W. TRAVALIA, AUGUST WEISS, EMMA W. JOHNSTON, AGNES W. TEULON, WILLIAM WEISS, ADELE S. STEIN, A. EDWIN STERN, A. EDWIN STERN, JR., JENNIE W. MILLSTEIN, HARRY S. WENDER, FLORENCE MARGARET W. LEHN, SHIRLEY JOAN W. UKRAINETZ, GEORGINA L. GEPPERT, EVELYN L. BAETWALDT, HELEN L. McGOVERN, GORDON LISSEL, JEAN L. GESCHWANDTNER, THERESA L. SEIDENS, JAMES LISSEL AND ALL UNKNOWN HEIRS OF EDWARD GORDON STERN

JOHNSON, Judge, dissenting.

The central issue presented by this appeal is not the facial constitutionality of this state's intestate succession laws governing the inheritance rights of illegitimate children and their heirs. Rather, the issue is one of statutory interpretation and application, for it is well estab-

lished that a statute which is fair and impartial on its face may be unconstitutional in its application in a particular instance if it is administered so as to result in unjust and illegal discrimination between persons similarly situated. Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220, 6 S. Ct. 1064 (1886); Bazemore v. Board of Elections, 254 N.C. 398, 119 S.E. 2d 637 (1961); In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983). In my opinion, the majority's failure to recognize the steps taken by the decedent's father to acknowledge his paternity of the decedent as constituting substantial or constructive compliance with the requirements of G.S. 29-19 (b)(2) works a palpable injustice in this case, is eroneous as a matter of statutory construction, and violates the constitutional right to equal protection under the law of the paternal heirs of the decedent.

I

Factually, a more compelling case for recognition of the doctrine of constructive or substantial compliance with the statutory requirement for proof of paternity would be hard to imagine. There is absolutely no doubt that Edward D. Stern is the natural or biological father of the decedent, Edward Gordon Stern (herafter Gordon Stern). The Certificate of Registration of Birth indicates that Gordon Stern was born to Hilda Weiss on 25 March 1927. At that time, Hilda Weiss listed her address as 2121 Lindsay Street, Regina. According to an affidavit submitted by John and Lea Ermel, neighbors and close family friends of Edward D. Stern and Hilda Weiss, Gordon's father and mother lived together at 2121 Lidnsay Street until shortly before Hilda Weiss' death when Gordon was six years old. Although Mrs. Ermel always thought the couple were legally married, Mr. Ermel knew that they were not.

> "I ... knew Edward D. Stern and Hilda Weiss were not legally married. However, Edward D. Stern always said to people that he was married. I remember Hilda telling me they wanted to cross the line to get married because they would not marry them in Regina for the fact that Edward D. Stern was Jewish and she, Hilda Weiss, was Catholic."

After Hilda Weiss' death, Edward D. Stern continued to live with his son Gordon at the family home in Regina.

In 1942, Gordon ran away from home and joined the Canadian Armed Services. After Gordon's return, he and his father had a falling out, and eventually Gordon moved to Norfolk, Virginia and went to work with his father's relatives. Apparently by the early 1960's, Gordon and his father had reconciled their differences. In 1964, Gordon obtained and order changing his name from Weiss to Stern in the United States. Throughout the 1960's and 1970's, Gordon visited his father regularly and tended to his father's estate and business affairs.

All of Gordon Stern's health and school records indicated that Edward D. Stern was Gordon Stern's father. Edward D. Stern's solicitor, James Griffin, stated in his affidavit that in conversation, Edward D. Stern never mentioned Hilda Weiss, but always referred to Gordon as his son. Further, that upon inquiry, Griffin advised the father to have Gordon officially change his last name in Canada from Weiss to Stern so as to facilitate indentification of Gordon as his son in Edward's will.

> "I have no doubt whatsoever that the description of Gordon E. [sic] Stern as "my son" in his will is what Edward D. Stern had intended and he believed he had made every necessary arrangement to have Gordon properly described in order to enable him to share in his estate."

The record also contains the affidavit of Josephine Eure, who lived with Gordon Stern as his common law wife for the last 11 years of his life. Ms. Eure stated that Gordon Stern and his father, Edward D. Stern considered themselves to be father and son in every respect and maintained several joint bank accounts with rights of surviorship. After Edward D. Stern's death in 1979, Gordon inherited approximately $500,000 from his father, thereby increasing his net worth from approximately $100,000 to $600,000. In addition, Ms. Eure stated that Gordon Stern maintained a very close relationship with his father's brothers and sisters and their children, but only heard infrequently from his mother's brothers and sisters and, in fact, have not even met some of them.

The foregoing evidence demonstrates that the parents of Gordon Stern were apparently prevented from marrying one another because of religious intolerance in the 1920's. Within a few years of Gordon's birth, his mother passed away. Edward D. Stern had always acknowledged that he was Gordon's father and provided for Gordon's needs while he was growing up. When Gordon moved to Virginia, his father's relatives provided him with employment. Through the years, Gordon maintained a close relationship with his father and his father's brothers and sisters, but had little or no contact with his mother's relatives.

Edward D. Stern, was, at all relevant times, a citizen and resident of Regina, in the province of Saskatchewan, Canada. Edward D. Stern, in his duly probated last will acknowledged himself to be the father of Gordon Stern and believed that he had thereby done all that was necessary to ensure that Gordon inherit the residue of his estate. Just one year prior to Gordon's death, he inherited the vast bulk of his estate from his father by that same will.

The issue presented by the foregoing factual summary is whether Edward D. Stern's lineal and collateral kin shall be completely precluded from inheriting from his acknowledged son, Gordon Stern under the North Carolina intestate succession statutes by virtue of the fact that Edward D. Stern failed to acknowledged his paternity by the precise method stated in G.S. 29-19(b) (2). More particularly, the issue of statutory construction is whether a father's acknowledgment of paternity in his duly probated last will is the substantial equivalent of an inter vivos acknowledgment of paternity in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b)[1] and filed during the lives of the father and child in the office of the clerk of superior court of the county where either resided. G.S. 29-19 (b) (2).

[1] G.S. 52-10(b) (Cum. Supp. 1983) provides, in pertinent part, as follows:

Such certifying officer shall be a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment is made.

II

The cases arising under G.S. 29-19 have thus far concerned the right of the illegitimate child to inherit from his or her putative father. The issue presented as to the inheritance rights of the paternal heirs in the intestate illegitimate child's estate is one of first impression under our intestate succession statutes. However, general principles of statutory construction and constitutional law are readily applicable to the case under discussion.

Prior to the enactment of G.S. 29-19, children born out of wedlock who were not ligitimated, either through marriage of their parents or ligitimation proceedings, could not inherit from their fathers. See Jolly v. Queen, 264 N.C. 711, 142 S.E. 2d 592 (1965); In re Lucas v. Jarrett, 55 N.C. App. 185, 284 S.E. 2d 711 (1981). In Mitchell v. Freuler, 297 N.C. 206, 254 S.E. 2d 762 (1979), the North Carolina Supreme Court expressly stated that one of the purposes in enacting G.S. 29-19 was the "mitigat [ion of] hardships created by former law (which permitted illegitimates to inherit only from the mother and from each other)." Therefore, G.S. 29-19 is to be considered a remedial statute.

It is well established that a remedial statute must be liberally construed as a whole in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained. Puckett v. Sellars, 235 N.C. 264, 69 S.E. 2d 497 (1952); Young v. Whitehall Co., 229 N.C. 360, 49 S.E. 2d 797 (1948). Furthermore, a construction will not be adopted that results in palpable injustice when the language of the statute is susceptible to another reasonable construction which is just and is consonant with the purpose and intent of the act. Puckett v. Sellars, supra.

In addition to the mitigation of former hardships visited upon illegitimate children and their families, the purposes of G.S. 29-19 are (1) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children and (2) at the same time, to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under the intestacy laws. Mitchell v. Freuler, supra. Obviously, the recognition of the acknowledgment of Edward D. Stern's paternity in his last will as constituting construc-

tive compliance with the requirements of G.S. 29-19(b) (2) would further the remedial purposes of the statute and attain the objective of equalization of the inheritance rights of legitimate and illegitimate children and their heirs. The question then becomes whether recognition of Edward D. Stern's testamentary acknowledgment of paternity would be undermine the state's interest in the orderly disposition of his illegitimate son's estate. I am firmly of the opinion that it would not. Edward D. Stern's testamentary acknowledgment can easily and properly be deemed to constitute constructive compliance with the requirements of G.S. 29-19 so as to establish the inheritance rights of his brothers and sisters in Gordon Stern's estate.

This Court has already recognized the applicability of the doctrine of constructive compliance to the provisions of G.S. 29-19 (b) (2) in Herndon v. Robinson, 55 N.C. App. 318, 291 S.E. 2d 305, appeal dismissed and cert. denied, 306 N.C. 557, 294 S.E. 2d 223 (1982). In Herndon, the plaintiff illegitimate child offered various written documents to prove that his father had acknowledged paternity and argued that these documents supported constructed compliance with the mandate of G.S. 29-19(b) (2). The documents offered were a life insurance policy insuring the life of the plaintiff, showing the decedent as the father and beneficiary of the policy; a census report showing plaintiff living in the decedent's household as "son;" and an employment application submitted by the decedent that listed the plaintiff as his son. Judge, now Justice, Harry C. Martin, writing for the court, implicitly accepted the argument that strict compliance with G.S. 29-19(b) (2) would not be required in every case, but rejected the sufficiency of the documents tendered to establish constructive compliance, reasoning that none of the writings admitted of "a conscious intent to establish paternity for the purposes of intestate succession."

> The formalities of N.C.G.S. 29-19(b) (2) ... serve a dual purpose. As a method for establishing paternity, a written instrument acknowledging paternity executed and filed with the clerk of superior court, assures the requisite degree of certainty. The formalities further assure that the decedent intended that the illegitimate child share in

> his estate, much the same way that a father intentionally excludes legitimate children as beneficiaries under his will. But, just as a father must act to exclude a legitimate child from sharing in his estate, he must also act to include an illegitimate child. (Emphasis original.)

57 N.C. app. at 321, 291 S.E. 2d at 307.

In this case, Edward D. Stern did act to include his illegitimate child in his estate. His duly probated last will admits of Edward D. Stern's conscious intent to establish paternity so that Gordon could take under that will. The will instrument itself also assures the requisite degree of certainty as a method for establishing paternity necessary for the orderly and just disposition of an estate under the intestate succession statutes. There is simply no reason to refuse to accept Edward D. Stern's demonstration of a testamentary intent to establish paternity for the purpose of also establishing paternal inheritance rights under the intestate succession laws. Furthermore, the formalities for executing a valid last will are far more rigorous than those required by G.S. 29-19 (b) (2) and once the will has been duly admitted to probate, the purpose behind the filing requirements of subsection (b) (2) has also been served. That purpose is clearly to safeguard the dependability of titles passing under the intestate succession laws.

It is thus evident that recognition of the acknowledgment of paternity contained in a duly probated last will as the substantial equivalent of the statutory inter vivos acknowledgement of paternity required by G.S. 29-19(b) (2) threatens absolutely no aspect of the just and orderly disposition of Gordon Stern's estate. On the contrary, the failure to recognize the fact of Edward D. Stern's acknowledged paternity of Gordon so as to establish intestate succession rights in the paternal heirs results in the patently unjust distribution of Gordon Stern's estate. The bulk (nearly 85%) of this estate had just been inherited by Gordon from Edward D. Stern one year prior to Gordon's own death. Disallowance of the right of Edward D. Stern's brothers and sisters and their children to share in Gordon Stern's estate has the practical effect of shifting what was in large part the inheritance of a Stern family estate entirely to the maternal Weiss heirs with

whom Gordon had little or no contact. In a case such as this, where there is no doubt as to paternity, where both the father and the father's relatives provided for the needs of the child as he was growing up, and no interest of the state would be adversely affected by a liberal construction of this remedial statute, the requirement of strict compliance works a palpable injustice and is indefensible as a matter of statutory construction.

In addition, the majority errs in concluding that subsection (d) of G.S. 29-19 applies only when the illegitimate child is seeking to inherit under the will of the putative father. G.S. 29-19 governs intestate succession by, through and from illegitimate children. By its terms, subsection (d) applies to those cases in which the father died testate, acknowledged his paternity of the illegitimate child in his duly probated last will and provided, expressly or by class devise, for the child therein. According to the majority's construction, the provision would serve no purpose other than the restatement of the obvious: the natural father of an illegitimate child can acknowledge paternity in his last will and provide for the child therein.

More inportantly, such a construction fails to account for the fact that the provision is contained at all in an intestate succession statute. Because of the context in which it appears, it is not reasonable to assume that subsection (d) is limited in applicability to determining only the right of an illegitimate child to inherit for a testate natural father under that father's will. Rather, the legislature must have included the provision in the intestacy statutes to serve a purpose which is related to the intestate inheritance rights of illegitimate children, their natural fathers and the lineal and collateral heirs of both.

Admittedly, the bare inclusion of subsection (d) in the statutory scheme of intestate succession, with no indication as to why it so appears or how it is to relate to subsections (b) or (c), renders the scheme ambiguous. However, in order to further the remedial purposes of the statute, the ambiguity should be resolved so as to equalize the inheritance rights of legitimate and illegitimate children and their heirs. Such a result would be achieved by construing subsection (d) to establish yet another method by which the illegitimate child could establish the unmarried father's paternity and therefore inherit by

intestate succession by, through and from his father and paternal heirs and the paternal heirs, in turn, could establish their right to inherit by, through and from the illegitimate intestate child who was fathered by one of their blood relations.

III

Another significant concern raised by the majority's requirement of strict compliance with the evidentiary paternity procedure described in G.S. 29-19 (b) (2) is the constitutionality of such a construction and application of the statute with regard to the inheritance rights of the paternal heirs of the illegitimate child. In Mitchell v. Freuler, supra, the statutory scheme as written was upheld against the illegitimate child's constitutional challenges on the basis of the United States Supreme Court's decision in Lalli v. Lalli, 439 U.S. 259, 58 L.Ed. 2d 503, 99 S.Ct. 518 (1978). A significant factor in the Lalli opinion which declared a New York statute governing the intestate succession rights of illegitimate children constitutional was the liberal interpretation given the statute by the New York courts.

The Lalli court looked specifically to the reach and effect of the statute as applied and cited with approval a number of cases in which the New York courts accepted constructive or substantial compliance with the statute so as to avoid "unnecessary injustice" and inequality.

> The New York courts have interpreted § 4-1.2 liberally and in such a way as to enhance its utility to both father and child without sacrificing its strength as a procedural prophylactic... In addition, the courts have excused "techinical" failures by illegitimate children to comply with the statute in order to prevent unnecessary injustice. (Citations omitted.)

439 U.S. at 273-274. This aspect of the Lalli opinion indicates that judicial treatment of remedial statutes aimed at mitigating the hardships endured by illegitimates and their heirs is an important component of equal protection analysis. By implication, a requirement of strict compliance with the purely evidentiary requirement of G.S. 29-19 (b) (2) in a case such as this where equally reliable evidence of paternity has been produced and the possibility of delay

and uncertainty in estate administration minimized, would take the reach of the statute "far in excess of its justifiable purposes," 439 U.S. at 273, and render the statute violative of the Equal Protection Clause as applied to the paternal heirs of this decedent. See also Note, 16 Wake Forest L. Rev. 205 (1980) (judicial impairment of the illegitimate child's paternal inheritance rights can be minimized in both statutory and constitutional respects by recognition of constructive compliance with the evidentiary requirements of G.S. 29-19).

The Lalli court's evident concern that intestate succession statutes not unnecessarily exclude those categories of illegitimate children whose inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles passing under the intestacy laws also led to the reversal of the Illinois Supreme Court's upholding of the intestacy statute challenged in Trimble v. Gordon, 430 U.S. 762, 52 L.Ed. 2d 31, 97 S. Ct. 1459 (1977). The Court made the following relevant observation on the proper balancing of the interests at stake in these cases:

> We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between §12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. (Emphasis added.)

430 U.S. at 770-771. The Illinois statute was found to set up an impenetrable barrier that worked to shield otherwise invidious discrimination and, in its stringent requirements, the statute was not "carefully attuned to alternative considerations."

Here, the paternal heirs of an intestate illegitimate child constitute a category of persons who are classified both on the basis of illegitimacy and on the basis of gender.[2] In those cases where the unmarried father acknowledged paternity in a formal testamentary instrument, the accurate and efficient identifcation of the father and paternal heirs for purposes of intestate succession poses no greater difficulty for the state courts than does identification of the mother and maternal heirs. Therefore, the paternal heirs's rights to inherit from the intestate illegitimate child can be recognized under G.S. 29-19(c) where the putative father has so acknowledged his paternity of the illegitimate child, without jeopardizing any of the state's interests in evidentiary accuracy and administrative efficiency. To completely exclude this category of natural heirs of the illegitimate child from intestate distribution on the basis of an ideal of administrative efficiency, without any consideration of the possibility of accurate and reliable proof of paternity produced in any manner other than those listed G.S. 29-19 (b) (1) or (2) is unnecessary, is not structured to further any permissible state objective and results in an unconstitutional denial of the paternal heir's rights to equal protection under the law.

For the foregoing reasons, I would reverse the trial court's ruling and allow paternal heirs to share in the intestate distribution of the estate of Gordon Stern.

[2] In recent years the constitutional rights of unmarried fathers in the areas of child custody and adoption have been greatly expanded. See e.g. Stanley v. Illinois, 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972) and Caban v. Mohammed, 441, U.S. 380, 60 L.Ed. 2d 297, 99 S.Ct. 1760 (1979). Gender-based distinctions must serve governmental objectives and must be substantially related to the achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause. Craig v. Boren, 429 U.S. 190, 50 L.Ed. 2d 397, 97 S.Ct. 451 (1976). Accordingly, any distinction between unmarried mothers and unmarried fathers must be structured reasonably to further these needs.

APPENDIX C

SUPREME COURT OF NORTH CAROLINA

IN THE MATTER OF THE ESTATE OF EDWARD GORDON STERN, DECEASED, H. T. MULLEN, JR., ADMINISTRATOR OF THE ESTATE OF EDWARD GORDON STERN,

V

CECILA STERN, ROBERT WEISS, MELVENA W. TRAVALIA, AUGUST WEISS, EMMA W. JOHNSON, AGNES WEISS TEULON, WILLIAM WEISS, ADELE S. STEIN, A. EDWIN STERN, JR., JENNIE W. MILLSTEIN, HARRY S. WENDER, FLORENCE MARGARET W. LEHN, SHIRLEY JOAN W. UKRAINETZ, GEORGINA L. GEPPERT, EVELYN L. BAERWALDT, HELEN L. McGOVERN, GORDON LISSEL, JEAN L. GESCHWANDTNER, THERESA L. SEIDENS, JAMES LISSEL and ALL UNKNOWN HEIRS OF EDWARD GORDON STERN.

CIVIL ACTION, FILE NO. 156A84

NOTICE

Notice is hereby given that Ceila Stern; A. Edward Stern, Jr.,; Adele S. Stern; Jennie W. Millstein; and Harry S. Wender; respondent paternal heirs, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of North Carolina entered in this proceeding on December 4, 1984.

This appeal is taken pursuant to Title 28, United States Code Section 1257, subparagraph (2).

Dated: February 25, 1985.

JENNETTE, MORRISON, AUSTIN & HALSTEAD

BY: _____
C. Glenn Austin

BY: _____
John S. Morrison

AFFIDAVIT OF SERVICE

I, C. Glenn Austin, depose and say that I am an attorney in the office of John S. Morrison and C. Glenn Austin, attorneys of record for Ceila Stern; A. Edward Stern, Jr.,; Adele S. Stern; Jennie W. Millstein; and Harry S. Wender; the appellants herein, and that on February 25, 1985, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the attached Notice on each of the parties required to be served herein as follows:

On Robert Weiss, Melvena W. Travalia, August Weiss, Emma W. Johnson, Agnes Weiss Teulon, William Weiss, Florence Margaret W. Lehn, Shirley Joan W. Ukrainetz, Georgina L. Geppert, Evelyn L. Baerwaldt, Helen L. McGovern, Gordon Lissel, Jean L. Geschwandtner, Theresa L. Seidens, James Lissel, the appellees herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Joseph M. Griffin, counsel of record for said appellees at his office at Suite 907, Cameron-Brown Building, 301 South McDowell Street, Charlotte, North Carolina 28204.

On Herbert T. Mullen, Jr. Administrator of the Estate of Edward Gordon Stern, herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to his office at Post Office Box 304, Elizabeth City, North Carolina 27909.

All parties required to be served have been served.

_____
C. Glenn Austin

Subscribed and sworn to before me on February 25, 1985.

Carl Bryant

Notary Public

My commission expires: June 17, 1987